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The “Innocence Penalty”: Is it More Pronounced for Juveniles?

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The “Innocence Penalty”: Is it More Pronounced for Juveniles?

Nilam A. Sanghvi & Elizabeth A. DeLosa*

ABSTRACT

Despite the presumption of innocence, we know that individuals accused of crimes are punished for maintaining their innocence in ways both tangible and intangible as they make their way through our criminal justice system. For example, even if instructed not to, jurors may infer guilt from a defendant’s failure to testify; defendants who exercise their right to go to trial receive lengthier sentences if convicted than those who plead guilty; and, once convicted, defendants who maintain their innocence are often denied opportunities for parole or clemency. This article explores whether these “innocence penalties” are even greater for children who are accused of crimes and comes to the preliminary view that the answer is yes. The main focus of the juvenile system is on redemption and rehabilitation, concepts that assume guilt. This article seeks to promote conversation about this important topic and create more room for the consideration of innocence in the juvenile system.

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INTRODUCTION

“A defendant is presumed innocent unless and until proven to be guilty beyond a doubt that would cause a reasonable and sensible person to hesitate in a matter of great importance to him or her.”¹

“No person . . . shall be compelled in any criminal case to be a witness against himself”²

The oft-quoted presumption of innocence and privilege against self-incrimination are the bedrock principles of the American criminal justice system. However, despite the maxim that you are innocent until proven guilty, it is no secret that those who choose to maintain their innocence are penalized for doing so at many points in their journey through the system. When asked to consider issues related to juveniles and wrongful convictions for this symposium, we wondered whether children making their way through the juvenile justice system face even more negative consequences for maintaining their innocence than adults do.³ While this question needs much further study, our preliminary view is that the answer is, unfortunately, yes, due in large part to the juvenile justice system’s focus on acceptance of responsibility and amenability to treatment.

I. WHAT IS THE “INNOCENCE PENALTY”?

For purposes of this piece, we use the term “innocence penalty” to describe the various ways—both tangible and intangible—that individuals accused of crimes are punished for maintaining their innocence. These penalties vary and occur before, during, and after conviction. We provide just a few examples here as context for this discussion.

There are multiple ways in which an accused person who chooses to go to trial, and therefore insists on the presumption of innocence, may be punished for making that choice. Perhaps the most significant punishment is the trial penalty—“individuals who chose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and

1. PBI, PA. SUGGESTED STD. CRIM. JURY INSTRUCTIONS § 2.01 (3d ed. 2019).

2. U.S. CONST. amend. V.

3. See, e.g., Allison D. Redlich & Reveka Y. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 49 L. & HUM. BEHAVIOR 611, 612 (2016) (internal citations omitted) (“Research has consistently demonstrated that juveniles are less active participants in legal cases and possess inadequate legal knowledge and understanding. In comparison to adults, juveniles aged 15 and younger have deficits in their legal understanding, knowledge, and decision-making capabilities.”).

lose.”⁴ According to a study by the National Association of Criminal Defense Lawyers, United States Sentencing Commission data on federal sentencing shows that, “[i]n 2015, in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence.”⁵ In one extreme example, a Pennsylvania Innocence Project client was offered an 18-month plea deal; he chose to go to trial, was convicted, and was sentenced to 3 life-without-parole sentences. This phenomenon means that even innocent people will plead guilty because they decide that going to trial is too much of a risk.⁶ Of the 2,755 individuals currently listed in the National Registry of Exonerations, 569 (just over 20 percent) pleaded guilty.⁷

There are other less tangible, but we believe equally real, penalties as well. For example, even though they should not, jurors likely do draw adverse inferences when defendants do not testify in their own defense at trial. Although a no-adverse-inference jury instruction exists, a defense attorney may fail to request it. And, even if given, studies show that jurors do not always follow instructions and often have trouble understanding them.⁸

The penalties for maintaining innocence continue after conviction and, arguably, become even worse. Convicted individuals who maintain their innocence are often *de facto* blocked from obtaining release from prison or clemency. The Pennsylvania Parole Handbook unequivocally tells parole applicants that, at their parole interviews, they “need to take responsibility for [their] crime(s).”⁹ And, although the Pennsylvania Board of Pardons is becoming more open to clemency applications from applicants who maintain their innocence, historically, an emphasis has also been placed on acceptance of responsibility for individuals applying for a pardon or commutation of sentence. Indeed, Pennsylvania’s clemency application assumes applicants were involved in the crime. It asks: “De-

4. NACDL, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 5 (2018).

5. *Id.* at 15.

6. *Id.* at 6.

7. See NAT’L REGISTRY OF EXONERATIONS, <https://bit.ly/2ORkMF0> [<https://perma.cc/H78F-JEN5>] (last visited Mar. 26, 2021).

8. See Vida B. Johnson, *Presumed Fair? Voir Dire on the Fundamentals of Our Criminal Justice System*, 45 SETON HALL L. REV. 545, 556 (2015).

9. PA. DEP’T OF CORR. & PA. PAROLE BD., UNDERSTAND THE PROCESS: YOUR PAROLE HANDBOOK 14 (2021), <https://bit.ly/3vpaJI7> [<https://perma.cc/N2U5-BW7K>].

scribe the incident and how you were involved. Where were you, what exactly did you do, and how were you caught?”¹⁰

II. ARE CHILDREN INVOLVED IN THE JUVENILE SYSTEM
SUBJECTED TO THE INNOCENCE PENALTY AT EVEN
MORE POINTS THROUGHOUT THEIR EXPOSURE TO
THE CRIMINAL JUSTICE SYSTEM?

Children involved in the juvenile justice system are subject to the same “innocence penalty” discussed above, and they may encounter it at even more critical points than adults involved in the criminal justice system. This question deserves further examination, but we point to several areas—the process of transferring juvenile cases to and from adult courts, the plea-bargaining process, and re-sentencings for “juvenile lifers”—in which innocent children may suffer more in the justice system. We offer a case study to try to illustrate the impact these issues potentially have in a real-life scenario.

Case Example:

Meet Michael Smith, a 17-year-old who has never been in any serious trouble with the law. Once, last year, school police caught him and his friends sharing a can of beer at a high school football game. They were charged with underage possession of alcohol and given a fine. Michael’s family could not afford to pay, so he worked off the fine by completing 50 hours of community service at a local soup kitchen. Michael is mostly interested in sports, girls, and hanging out with his four closest friends. He hopes to attend Penn State next year on a baseball scholarship; without one, he cannot afford college.

Last Friday during school, one of Michael’s friends got into a fist fight with another student. Michael was not there but heard about the fight later that day. The story going around school was that Michael’s friend started the fight, but the other boy was much bigger and easily took control. Michael’s friend suffered a broken nose, a concussion that caused unconsciousness, two broken ribs, and a collapsed lung. He was taken to the hospital in an ambulance and admitted in serious but stable condition. Michael was upset about his friend’s injuries. Other students saw him talking excitedly with two other close friends; all three boys reportedly left school early.

10. PA. BD. OF PARDONS, PA. CLEMENCY APPLICATION PACKET 8 (n.d.), <https://bit.ly/3s5GumR> [<https://perma.cc/2GXA-53AF>].

Later that night, the boy Michael's friend fought with was accosted and dragged from school to the basketball court by three unknown assailants in ski masks. The assailants did not say anything; they beat the boy severely with baseball bats. He was rushed to the local hospital, but he died a few days later from internal bleeding caused by blunt force trauma. Police were called, the boy's death was ruled a homicide, and the investigation began.

Police soon learned about the fist fight that had occurred a few days before. They also learned that the deceased had caused substantial injuries to another boy during that fight. Witnesses told police that they saw Michael and two other boys talking angrily among themselves before leaving school early. Police focused their investigation on Michael and his two friends, believing the fist fight to be the motive for the deceased's beating.

Police asked the high school principal to help them find Michael. The principal took them to Michael's classroom, and police went in, interrupted his class, and asked him to go with them to the station. Michael felt he had no choice but to go. Once there, police placed Michael in a 10x10 cinderblock room with a metal table, two chairs, and a two-way mirror. Michael had only seen a room like this on TV. The officer who escorted Michael into the room closed the door behind him. Michael sat in the chair furthest from the door. He did not know whether the door was locked and was too afraid to try the handle. He did not know if his mother knew where he was.

Eventually, a detective entered the room. He read Michael some rights, but Michael did not really understand. Michael believed that if he told the detective the truth, everything would get straightened out. He told the detective that he was at home with his mother and younger sister the night of the brutal beating. The detective said he didn't believe him. He implored Michael to take responsibility, telling him that “things would go easier for him” if he “simply told the truth.” The detective told him he understood how things could have gotten “out of hand.” Michael was charged with first degree murder.

Given the seriousness of the charge, Michael was charged as an adult and immediately taken to the adult county jail.¹¹ Some county facilities have separate accommodations for juveniles. Michael's county jail did not. Michael was housed among adult men who were accused of violent crimes. He went through the jail intake process—was strip searched, fingerprinted, and his picture was taken.

He appeared in a video conference where a person, who he thought was a Judge, read him his charges—first degree murder. He

11. 42 PA. CONS. STAT. § 6355(e) (2021).

tried to tell the Judge that he had nothing to do with the crime. The Judge cut him off and said something about the nature of the offense—"No Bail."

Michael was assigned a cell. His cell-mate was a 25-year-old man awaiting trial for armed robbery of a convenience store. He seemed to know the jail pretty well. For the most part, he stayed in his cell. He came out for headcount (because he had to) and to get his tray of food. He kept his head down; there were several fights on his pod. One, he thought, started over a chocolate pudding cup. Another over someone staying on the phone too long.

It took five days for a lawyer to come see Michael.

III. CERTIFICATION/DECERTIFICATION.

Children may be punished for maintaining their innocence at what may be the most critical stage of the juvenile justice process—namely, transfer proceedings that determine whether a case will be decided in juvenile or adult court. In Pennsylvania, juveniles charged with crimes generally have their cases proceed in juvenile court; however, juveniles who are charged with murder or who are over 15 years of age and accused of certain other offenses that are exempted from the definition of “delinquent act” in the Juvenile Act will have their cases proceed in adult court.¹² Indeed, nationwide, “youth are routinely charged and prosecuted in the adult criminal justice system.”¹³ If a case in Pennsylvania begins in juvenile court, the Commonwealth may seek to have it transferred to adult court in a “certification” process.¹⁴ Conversely, if a case begins in adult court, the accused child can seek to have it transferred to juvenile court in a “decertification” process.¹⁵

This certification/decertification stage is critical given the stakes for children who are prosecuted in adult court. If incarcerated before trial, they will likely be housed in adult jails as opposed to being held in a juvenile detention facility if their case proceeded in the juvenile system. And, if convicted, they will face much more severe penalties, including longer sentences and periods of supervi-

12. See 42 PA. CONS. STAT. § 6302 (2021) (defining delinquent act).

13. *Issues: Youth Tried as Adults*, JUV. L. CENTER, <https://bit.ly/3cKIdbm> [<https://perma.cc/E7GT-TE8Z>] (last visited Mar. 3, 2021); see also, e.g., Nicole Sciabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, AM. BAR ASS'N (Oct. 3, 2016), <https://bit.ly/2ORFcoI> [<https://perma.cc/PKP3-DPA4>] (discussing various state procedures for charging juveniles as adults and for transferring cases to and from adult courts).

14. See 42 PA. CONS. STAT. § 6355 (2021) (governing transfer to criminal proceedings).

15. See *id.* § 6322 (governing transfer from criminal proceedings).

sion as well as incarceration in state prisons. For example, in *Commonwealth v. Taylor*,¹⁶ 15-year-old Nazeer Taylor was charged with several sex offenses allegedly against his then 11-year-old foster brother. After a two-day hearing, all of his charges were transferred from the juvenile to state adult court. If his case had stayed in the juvenile system, Taylor would have been offered treatment and jurisdiction would have ended automatically at age 21. Instead, after being tried and convicted in adult court, Taylor was subject to a minimum of 35 years of supervision, including as much as 25 years of incarceration in adult state prison.¹⁷ At least one court has stated that “the certification of a juvenile offender to adult court has been accurately characterized as the worst punishment the juvenile system is empowered to inflict.”¹⁸

Judges have broad discretion in determining whether cases should be transferred to or from adult court.¹⁹ In exercising that discretion, the judge must consider whether “there are reasonable grounds to believe that the public interest is served” by transferring the case.²⁰ Among the factors the Juvenile Act requires be considered in that analysis are “whether the child is amenable to treatment, supervision or rehabilitation as a juvenile” and “whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction.”²¹

In conducting this analysis, courts appear to place significant weight on whether children accepted responsibility for the offenses with which they were charged; if they did not, they were determined not to be amenable to rehabilitation. Although the Juvenile Act was passed in 1972 and has existed in its current form since

16. *Commonwealth v. Taylor*, 230 A.3d 1050, 1053 (Pa. 2020).

17. *Id.* at 1057–58.

18. *Ramona R. v. Superior Ct.*, 693 P.2d 789, 795 (Cal. 1985) (internal quotation marks and citation omitted). In this case, if the accused child’s case had proceeded in juvenile court, she likely would not have been confined past her twenty-fifth birthday; in adult court, she faced a potential life sentence for murder. *Id.*

19. *See, e.g., Taylor*, 230 A.3d at 1071 (“We recognize that the Juvenile Act vests with the juvenile court a substantial degree of discretion within which to adjudicate whether jurisdiction over a minor should be retained or should be transferred to an adult court for criminal prosecution.”); *Commonwealth v. Brown*, 26 A.3d 485, 493 (Pa. Super. Ct. 2011) (internal citations omitted) (“The ultimate decision of whether to certify a minor to stand trial as an adult is within the sole discretion of a decertification court. This Court will not overturn a decision to grant or deny decertification absent a gross abuse of discretion.”).

20. 42 PA. CONS. STAT. § 6355(a)(4) (2021).

21. *Id.* § 6355(a)(4)(iii)(G), (G)(VII).

1995,²² it is only within the last 10 years that Pennsylvania's appellate courts have made clear that acceptance of responsibility cannot be required at the certification/decertification stage.

In *Commonwealth v. Brown*,²³ decided in 2011, a child charged with committing a murder when he was 11 years old sought decertification of his case from adult court to juvenile court.²⁴ He maintained his innocence in interviews with psychologists retained by the Commonwealth and the defense.²⁵ The court denied decertification, finding persuasive the reasoning of the Commonwealth's psychologist that because the child "would not take responsibility for his actions," "the prospects of rehabilitation within the juvenile court jurisdiction [was] likely to be unsuccessful."²⁶ The Pennsylvania Superior Court concluded that, by conditioning its conclusion that the child was not amenable to treatment on the fact that the child did not admit guilt, the court violated the child's Fifth Amendment right against self-incrimination.²⁷

Within the last year, the Pennsylvania Supreme Court took up the question of what role, if any, acceptance of responsibility should play in the certification/decertification process. In *Commonwealth v. Taylor*, the minor did not admit to the delinquent acts with which he was charged, and the juvenile court granted the Commonwealth's motion to transfer the case to adult court.²⁸ The Supreme Court adopted *Brown's* reasoning and finally made clear that:

Simply put, a minor's refusal to confess to an act for which he or she might be criminally prosecuted may not be considered when deciding whether to certify a case for transfer between juvenile and adult court. This remains true irrespective of the necessary considerations of amenability to treatment contemplated by the Juvenile Act or of the possibility of immunity contained therein.

22. See PA. JUV. CT. JUDGES' COMM'N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK, §§ 3.2–3.3 (2018), <https://bit.ly/2Ngm9g8> [<https://perma.cc/6PZM-N5SE>].

23. *Commonwealth v. Brown*, 26 A.3d 485 (Pa. Super. Ct. 2011).

24. *Id.* at 489.

25. *Id.* at 489–90.

26. *Id.* at 490 (alteration in original) (internal quotation marks omitted).

27. *Id.* at 510; see also *id.* at 506 ("Here, by finding that Appellant had to admit guilt or accept responsibility for his actions as a condition to proving that he was amenable to treatment, the trial court placed Appellant in a situation that needlessly encouraged Appellant to sacrifice his Fifth Amendment rights against self-incrimination. As a result of the choice posed by the trial court, Appellant could either incriminate himself and possibly receive transfer to the juvenile system or not incriminate himself and face trial in the criminal system. In order for Appellant to obtain transfer to juvenile court and receive a lesser sentence for the same offenses, Appellant . . . would have to forego his constitutional rights.").

28. *Commonwealth v. Taylor*, 230 A.3d 1050, 1053–54 (Pa. 2020).

As there is no way to guarantee that certification would be denied, or decertification granted, upon an admission of guilt, a minor cannot be expected to take so broad a leap of faith.²⁹

Given the recency of these decisions, and the continued presence of language regarding amenability to treatment and rehabilitation in the transfer sections of the Juvenile Act, it remains to be seen whether children who maintain their innocence will truly suffer no adverse consequences for doing so in the certification/decertification context. This is particularly true because the Pennsylvania appellate courts have not yet decided what relief may be available to a juvenile whose refusal to confess is held against him or her during the certification/decertification process. *Taylor* left this question open for consideration by the Pennsylvania Superior Court, concluding:

[w]e reverse the judgment of the Superior Court and remand for a determination, in the first instance, and with developed advocacy of the parties, of whether the harmless error doctrine is applicable to the juvenile court’s constitutionally deficient misapplication of the Juvenile Act’s transfer provisions and, if it is not or if the error is not harmless, for consideration of the available relief under these circumstances.³⁰

If the harmless error doctrine applies, the possibility remains that children’s rights in this regard may still be violated without a strong remedy.

Continued Case Example:

As soon as the lawyer sat down, he began to tell Michael about a thing called a “Decertification” hearing, explaining that it was the only way to get him transferred back to juvenile court where instead of life in prison he could receive “treatment.” “Treatment for what?” Michael thought. “I didn’t do anything.” The lawyer told him that a psychologist with specialized training in the adolescent brain would come to the jail to interview him to make sure that he would be “amenable to treatment.” Then the lawyer got up to leave. Michael spoke up, “What if I didn’t do this? What if I am innocent?” The lawyer said:

Look, you are facing first degree murder charges. Do you understand what that means? It’s very, very serious. You could spend the rest of your life in prison. Here in Pennsylvania life in prison without the possibility of parole means—Life In Prison. You will

29. *Id.* at 1072 (emphasis added).

30. *Id.* at 1073.

never get out. My advice is that you cooperate with the psychologist. You have a fairly clean record. I think we can make a good argument for decertification. You are 17 now, right? The juvenile system can only maintain jurisdiction until you are 21. That means at most you will serve 4 years in a juvenile detention facility. When you get out you would have the rest of your life ahead of you. A trial in criminal court is just not worth the risk

Michael went back to his cell. Life in prison—for something he didn't do. How was this happening? Could he do four years in a juvenile facility? Could he say he did something he didn't do—killed someone—beat someone to death with a baseball bat?

Two days later the psychologist came to the jail see him. She wore a grey suit and glasses. She asked him questions about his childhood, his little sister, and his mom. She asked him how often and for how much time he and his sister were left at home alone. His mom has to work to support the family he explained. He hated it. He didn't know this woman. Who was she to judge him and his family? His mom wouldn't have liked her either—she was nosey. After talking to the lawyer, he was afraid to tell her that he didn't do this. If he did, would this ruin his chances of being sent back to juvenile court? Did he have to accept responsibility in order to be “amenable to treatment”? Treatment he didn't need! His head hurt.

“F\$%# this, I didn't do this . . . I DON'T NEED TREATMENT.” Michael yelled. Wide-eyed, the psychologist put her folders and papers away. She slid her chair from the table and left the room. Michael held his head in his hands and listened to her heels echo as they clicked down the hall.

Two weeks later, a correctional officer woke Michael at 4 a.m. and told him to get ready to be transported to court. Once there, he sat in a holding cell in the basement of the courthouse for hours. Eventually, the lawyer came down to talk to him. He was allowed to leave the holding cell and sit inside a smaller cage with the lawyer. He explained that the psychologist's report “did not come out well.” The lawyer had to argue to the Judge that it was in the “public's best interest” for Michael to be decertified. Unfortunately, given the brutality of the offense and the fact that Michael lost his temper during the evaluation, the psychologist recommended that the court move forward with adult criminal charges.

Michael was brought up to the courtroom. The psychologist testified. She talked about Michael's home life and his “deep loyalty” to his family and friends—as if that was a bad thing. She also described Michael's “outburst” during her interview. Based on the psychologist's testimony, his motion for decertification was DENIED.

IV. PLEAS.

According to the National Juvenile Defender Center, “[t]he majority of cases filed in delinquency court are resolved through a plea agreement.”³¹ The pressures to forego trial and to give up on a claim of innocence may therefore be even stronger in the juvenile setting. Research suggests that innocent children in juvenile court may be particularly likely to plead guilty, tracking with research which indicates that juveniles are also particularly susceptible to false confessions.³²

Continued Case Example:

A few weeks after the decertification hearing, the lawyer came back to the county jail to see Michael. He said even though the decertification hearing went badly he had some “good news.” The District Attorney had offered Michael and his co-defendants a “plea deal”—plead GUILTY to third degree murder. In exchange, the prosecutor would seek a “guideline sentence,” but because of the brutality of the crime, the prosecutor would be asking the Judge to sentence all three boys in the “aggravated range” along with a long tail of probation.

The lawyer looked pleased with himself.

He explained that because Michael had never been in serious trouble before, his prior record score was low. He kept referring to Michael as a “zero.” Michael’s head was spinning. The lawyer said that, even in the aggravated range, Michael was probably looking at no more than a 2½- to 5-year sentence, although he warned the Judge could sentence Michael all the way up to the statutory maximum—which for third degree murder was 40 years.

WHAT?? Michael didn’t understand—plead guilty to something he didn’t do? Possibly spend the next 5 to 40 years in a prison? No, Michael shook his head.

The lawyer looked confused. Michael told him he could not plead guilty to something he didn’t do. “If you go to trial and lose, the lawyer said, you will spend the rest of your life in prison! Take the plea—it’s a good deal.”

“Tell the prosecutor I said, No.” Michael went back to his cell. He did not commit this crime; there was no way they could convict him.

31. *Pleas*, NAT’L JUV. DEF. CTR., <https://bit.ly/3qL9ShF> [<https://perma.cc/TA33-VXBF>] (last visited Jan. 14, 2021).

32. Redlich & Shteynberg, *supra* note 3, at 613, 622–23 (“juveniles are over-represented in proven false confession cases.”).

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Eight months later, Michael went to trial facing first degree murder charges along with his two co-defendants. The prosecution alleged that the three boys were so infuriated by the injuries suffered by their friend that they took matters into their own hands. They left school early, got ski masks from their homes, stole baseball bats from the baseball fieldhouse to which they had access, and waited for the deceased near the basketball court—a popular local hangout. The Commonwealth conceded that no physical evidence tied the three boys to the crime and that its case rose and fell on eyewitness identification and circumstantial evidence—namely, the boys’ connection to the baseball team. The Commonwealth had executed search warrants on all three boys’ homes and did not locate any of the clothing, baseball bats, or ski masks believed to be used during the assault.

After six hours of deliberation, the jury convicted all three boys. The Judge immediately sentenced all three to the mandatory sentence of life in prison without the possibility of parole. Michael appealed his conviction—it was summarily denied. Michael believed he would probably never have a chance to prove his innocence or even to return home on parole. He kept appealing anyway, fighting for justice.

V. “JUVENILE LIFER” RESENTENCING.

In Pennsylvania, life means life. In other words, individuals convicted of first- or second-degree murder are subject to mandatory life without parole—a sentence with no chance of release.³³ For decades, this sentencing scheme applied to those who were juveniles at the time of the crimes they were alleged to have committed, as well as to adults. As of 2016, in Pennsylvania, 514 people convicted of crimes they committed, or allegedly committed, as children were incarcerated for life without parole; the vast majority of these “juvenile lifers” were from Philadelphia County.³⁴

In 2012, these juvenile lifers finally received a glimmer of hope. In *Miller v. Alabama*,³⁵ the United States Supreme Court held that mandatory life without parole sentences for juveniles are unconstitutional because they violate the Eighth Amendment’s prohibition against cruel and unusual punishment.³⁶ The Court recognized that

33. 18 PA. CONS. STAT. § 1102(a)–(b) (2021).

34. Samantha Melamed, *Innocent—and Stuck in Prison for Life? Philly Juvenile Lifers Face a Catch 22*, PHILA. INQUIRER (Dec. 9, 2018), <https://bit.ly/3cmYt2d>.

35. *Miller v. Alabama*, 567 U.S. 460 (2012).

36. *Id.* at 465.

“children are different”³⁷ and are entitled to individualized sentencing determinations, noting that “juveniles have diminished culpability and greater prospects for reform.”³⁸

A few years later, the Court decided in *Montgomery v. Louisiana*³⁹ that its decision in *Miller* applied retroactively.⁴⁰ The Court thus opened the door to re-sentencing for any juvenile with a mandatory life without parole sentence, even those sentenced before *Miller* was decided. The Court confirmed that “[t]he opportunity for release will be afforded to those who demonstrate the truth of *Miller*’s central intuition—that children who commit even heinous crimes are capable of change.”⁴¹

Pennsylvania’s hundreds of juvenile lifers prepared for re-sentencing, many having served decades believing they had no chance of ever returning home. However, the justice system once again punished those who maintained their innocence. In *Commonwealth v. Bryant*,⁴² decided years before *Miller* and *Montgomery*, the Pennsylvania Supreme Court held that “the orderly administration of justice requires” that guilt-phase claims—in other words, claims for relief based on constitutional errors at trial or on new evidence of innocence—be addressed before “the imposition of a new sentence by the trial court.”⁴³ Based on this decision, Pennsylvania courts refused to re-sentence juvenile lifers pursuant to *Miller* and *Montgomery* if they were still pursuing claims for post-conviction relief based on their innocence. Suddenly, rather than looking forward to the opportunity to return home, innocent juvenile lifers faced an incredibly difficult decision—should they give up their innocence claims in exchange for a prompt re-sentencing, or should they pursue them, knowing it could mean years or even decades more spent in prison serving an illegal sentence?⁴⁴

Some juvenile lifers contemplated abandoning their innocence claims as they watched others going home who admitted their guilt.⁴⁵ Others said they would continue to fight to clear their names, no matter what. One juvenile lifer, Robert Outlaw, stated in a 2018 interview with the *Philadelphia Inquirer*,

37. *Id.* at 481.

38. *Id.* at 471.

39. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

40. *Id.* at 736.

41. *Id.*

42. *Commonwealth v. Bryant*, 780 A.2d 646 (Pa. 2001).

43. *Id.* at 648.

44. *Melamed*, *supra* note 34.

45. *Id.*

“I’m going to have to exhaust my remedies, and that’s that,” he said. “I’m passionate that I didn’t do it, and whatever hardships I’m going to face with that, that’s what it’s going to be. At the end of the day . . . I’m just not going in there admitting guilt for something that I didn’t do.”⁴⁶

For those who proceeded to re-sentencing, they did so with the understanding that, if they maintained their innocence, they would likely receive harsher sentences than those who admitted guilt because acceptance of responsibility and showing remorse are factors considered in the re-sentencing process.⁴⁷ And, even when they became parole eligible, the Parole Board likely would also fault them for failing to accept responsibility.⁴⁸

Continued Case Example:

Michael continued to fight to prove his innocence, including writing to the Pennsylvania Innocence Project.

In 2011, several issues came to light with how the case was investigated and the way in which the eyewitness identifications were obtained. Through post-conviction investigation, Michael learned that his picture was not merely selected from a photo array but that police had shown his picture to witnesses and asked specifically whether they had seen him anywhere near school grounds on the night of the victim’s death. Initially, no one identified Michael as being present. It was not until several days later that a witness who had already been shown Michael’s photograph selected Michael’s photo from the array. Moreover, this witness’s original description of the person she saw that night did not match her trial testimony or Michael’s physical appearance at the time. Her original police report, however, was not turned over to defense counsel in discovery prior to trial. Michael filed a Post Conviction Relief Act (PCRA) Petition alleging various

46. *Id.* (alteration in original). Since the men profiled in the *Inquirer* article were interviewed, three (Robert Outlaw, Theophalis Wilson, and Terrance Lewis) have been exonerated and one (David Sparks) has been re-sentenced and continues to push for exoneration. See Robert “Donald” Outlaw, PA. INNOCENCE PROJECT, <https://bit.ly/30DVVaB> [<https://perma.cc/FS9P-4Y8B>] (last visited Jan. 15, 2021); Theophalis Wilson, NAT’L REGISTRY OF EXONERATIONS, <https://bit.ly/3taDqXt> [<https://perma.cc/MJ2S-35M6>] (last visited Jan. 15, 2021); Terrance Lewis, NAT’L REGISTRY OF EXONERATIONS, <https://bit.ly/2OnRVsc> [<https://perma.cc/TJY4-MN9C>] (last visited Jan. 15, 2021); *Commonwealth v. Sparks*, CP-51-CR-0001327-2007 (Phila. Cnty. Ct. Com. Pl.). The Pennsylvania Innocence Project represents Mr. Outlaw and Mr. Sparks.

47. Pennsylvania Innocence Project interviews with juvenile lifers.

48. See *supra* note 19 (discussing requirement of acceptance of responsibility in parole process).

violations of his constitutional rights and was appointed an attorney to represent him.

While Michael's case was ongoing, in June 2012, the U.S. Supreme Court decided *Miller v. Alabama*, holding that the mandatory imposition of a life sentence without the possibility of parole for a juvenile convicted of murder was unconstitutional. In 2013, Michael's attorney amended his PCRA petition to include his juvenile life without parole resentencing claims. Michael learned that he was just one of about 500 such cases in Pennsylvania.

Five long years later in fall 2017, Michael's case was finally scheduled for a hearing with the court. Unfortunately, when the Judge finally took the bench, he flatly told Michael's attorney that the court was not resentencing anyone who still had “freestanding claims of innocence” or “guilt-phase claims”—as Michael did. The lawyer explained that this left Michael with two choices: (1) give up his innocence and guilt-phase PCRA claims (i.e. the issues with the investigation and eyewitness identifications) and proceed directly to resentencing in the hopes that the Judge would have mercy on him and make him immediately parole eligible or (2) continue to fight to prove his innocence with no guarantee that he would be successful and hope that he does not anger the resentencing Judge in the process. Michael's lawyer also warned that he had heard rumors that those individuals who maintained their innocence during resentencing were being “hit” with a two-year failure to take responsibility penalty from resentencing judges. So, even if he decided to give up his fight to prove his innocence—something he had been doing for nearly two decades now—again, he was faced with the prospect of having to take responsibility for a crime he did not commit.

Michael knew that post-conviction litigation could take years without any guarantee of success. A friend of his while incarcerated actually had a federal magistrate Judge write in an opinion that he was most likely “actually innocent” of the crime but nonetheless deny relief due to “procedural” barriers. Michael had no illusions that being innocent mattered . . . once convicted the only thing that mattered was maintaining the conviction.

The Commonwealth made Michael an offer—in exchange for dropping all of his guilt-phase and freestanding innocence claims, it would recommend a sentence of 22 years to life, but the Judge would not be bound by the recommendation. If the Judge sentenced Michael to the recommended 22 years to life, he would be eligible for parole very soon. However, if the Judge departed from the recommendation, Michael could be facing something as high as the current statutory sentence of 35 years to life, meaning it would be many years

before he was parole eligible. Additionally, should he receive a minor infraction for anything after being re-sentenced, his first parole hearing could be delayed by up to one additional year. Those would be wasted years that he could have been fighting to prove or maybe even have proved his innocence and been home with his family. OR maybe not, and if he kept fighting, he could end up spending more time behind bars than he would have by accepting the deal. Which was the right decision?

This account demonstrates that juveniles appear to be penalized for maintaining their innocence from the initial decisions regarding whether they will accept a plea to later decisions about whether their cases will proceed in adult or juvenile court, and whether and when they will be re-sentenced if eligible under *Miller* and *Montgomery*.

VI. WHY IS THE “INNOCENCE PENALTY” WORSE IN THE JUVENILE CONTEXT?

If, as it appears, the “innocence penalty” particularly affects those charged with crimes as juveniles, the question then becomes why. There is one commonsense answer—children have fewer tools at their disposal to make strategic decisions as their cases proceed through the criminal justice system. More significantly, there is evidence of a systemic answer as well that is rooted in the very nature of the juvenile justice system.

A stated purpose of Pennsylvania’s Juvenile Act is “to provide for children committing delinquent acts programs of supervision, care and *rehabilitation* which provide balanced attention to the protection of the community, the *imposition of accountability* for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.”⁴⁹ In keeping with this, Pennsylvania’s Juvenile Justice Mission Statement is: “Juvenile Justice: Community Protection; Victim Restoration; *Youth Redemption*.”⁵⁰ “Youth Redemption embodies the belief that juvenile offenders in Pennsylvania have

49. 42 PA. CON. STAT. § 6301(b)(2) (2021) (emphasis added); *see also, e.g., In re B.T.C.*, 868 A.2d 1203, 1204 (Pa. Super. Ct. 2005) (“Further, one of the purposes of the Juvenile Act is hold children accountable for their behavior.”); *In re J.C.*, 751 A.2d 1178, 1181 (Pa. Super. Ct. 2000) (“This section [42 Pa. C.S. § 6301(b)(2)] evidences the Legislature’s clear intent to protect the community while rehabilitating and reforming juvenile delinquents.”).

50. PA. JUV. CT. JUDGES’ COMM’N, *supra* note 22, at § 2.2 (emphasis added).

strengths, are capable of change, can earn redemption, and can become responsible and productive members of their communities.”⁵¹

The goals of rehabilitation and redemption thus undergird the entire structure of Pennsylvania’s juvenile justice system. Both concepts are grounded in the idea that someone has done something wrong but can change or be redeemed. For example, Merriam-Webster defines rehabilitation as “the process of restoring someone (such as a criminal) to a useful and constructive place in society.”⁵² It defines redemption as “the act, process, or an instance of re-deeming,”⁵³ and “redeem,” in turn, is defined as “to release from blame or debt, to free from the consequences of sin, to change for the better, [to] restore”⁵⁴ While these are laudable and necessary goals by themselves, they do not leave much room for the consideration of potential innocence. The focus of goals centered upon fixing people in the juvenile justice system operates on a presumption that the children in the system are broken—a presumption that does not allow for consideration of whether a child maintaining innocence is telling the truth.

The *Brown* and *Taylor* cases discussed above highlight this problem with the early stages of the juvenile processes’ emphasis on amenability to rehabilitation and redemption—the possibility that a child who maintains his or her innocence may be doing so credibly does not seem to be considered. While further analysis of the question posed here—whether the innocence penalty particularly affects children—is certainly required, in our view, creating space for dialogue concerning potential innocence when we talk about the juvenile justice system is a necessary first step. Only when attorneys and judges are willing to consider this possibility can they assess claims of innocence by children in an unbiased way. Ultimately, true justice requires moving away from a system that almost routinely allows innocent children to be tried in adult court and away from statutory language requiring the imposition of accountability.

51. *Id.* at § 2.3.

52. *Rehabilitation*, MERRIAM-WEBSTER, <https://bit.ly/38xwyeS> [<https://perma.cc/V7LR-K4YZ>] (last visited Jan. 15, 2021).

53. *Redemption*, MERRIAM-WEBSTER, <https://bit.ly/3evvGLJ> [<https://perma.cc/6ARH-54UL>] (last visited Jan. 15, 2021).

54. *Redeem*, MERRIAM-WEBSTER, <https://bit.ly/30Ce3BK> [<https://perma.cc/S7WN-6MTE>] (last visited Feb. 10, 2021).
